SILBER *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 454. Argued April 19, 1962.—Decided June 25, 1962.

Petitioner's indictment for violating 2 U. S. C. § 192 was identical to those held defective in *Russell* v. *United States*, 369 U. S. 749; the District Court erroneously denied a timely motion to dismiss it; and petitioner was convicted. The issue raised by the motion to dismiss apparently was not presented to the Court of Appeals, and it was not briefed or argued in this Court. *Held:* This Court, at its option, may notice a plain error not presented, and the judgment sustaining the conviction is reversed on the authority of *Russell* v. *United States*. Pp. 717–718.

111 U. S. App. D. C. 331, 296 F. 2d 588, reversed.

Victor Rabinowitz argued the cause for petitioner. With him on the briefs was *Leonard B. Boudin.*

Bruce J. Terris argued the cause for the United States. On the briefs were *Solicitor General Cox, Assistant Attorney General Yeagley, George B. Searls* and *Kevin T. Maroney.*

PER CURIAM.

The judgment is reversed. *Russell* v. *United States*, 369 U. S. 749. The indictment upon which the petitioner was tried was identical to those held defective in *Russell.* The petitioner's timely motion to dismiss the indictment, made in accord with Fed. Rules Crim. Proc. 12 (b)(2), was erroneously denied by the District Court.

Although the trial court squarely considered and decided the issue raised by the motion to dismiss, it was apparently not presented to the Court of Appeals and was not briefed or argued in this Court. While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised here, that rule

is not without exception. The Court has "the power to notice a 'plain error' though it is not assigned or specified," *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 412.* "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson,* 297 U. S. 157, 160. Our own rules provide that "the court, at its option, may notice a plain error not presented." Revised Rules of the Supreme Court of the United States, Rule 40 (1)(d)(2). See also Fed. Rules Crim. Proc. 52 (b).

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE WHITE took no part in the decision of this case.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their dissenting opinions in *Russell* v. *United States,* 369 U. S. 749, 779, 781.

*See *Brasfield* v. *United States,* 272 U. S. 448, 450; *Mahler* v. *Eby,* 264 U. S. 32, 45; *Weems* v. *United States,* 217 U. S. 349, 362. See also *Kessler* v. *Strecker,* 307 U. S. 22, 34.